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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 212

MOSES LAKE HOMES, INC., ET AL., *Petitioners,*

vs.

GRANT COUNTY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

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STATUTES INVOLVED

28 U.S.C.A. § 2281.

Applicable state statutes omitted by the Petitioners are:

R.C.W. 84.04.080;
R.C.W. 84.08.130;
R.C.W. 84.08.140;
R.C.W. 84.40.040;
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R.C.W. 84.60.030;
R.C.W. 84.68.010;
R.C.W. 84.68.070.

CONSTITUTION

Washington State Constitution, Art. VII, § 1 (14th Amend.) and Art. VII, § 2 (17th Amend.)

DECISIONAL LAW

Both the Circuit Court (R. 350) and the District Court (R. 154, III) relied upon *Puget Sound Power & Light Co. v. Cowlitz County*, 38 Wn.(2d) 907, 234 P. (2d) 506 (1951) as correctly interpreting state tax law and R.C.W. 84.60.030. Subsequent to the opinion below, that case was overruled by *Air Base Housing, Inc. v. Spokane County*, 156 Wash. Dec. 604 (Adv. No. 20, Aug. 25, 1960).

QUESTIONS PRESENTED

(1) Does Washington tax law discriminate against private lessees of federal land?

(2) If so, is res judicata a bar to a collateral contest of the tax in a condemnation action?

(3) Does the failure of a taxpayer to administratively contest questions of valuation of his property bar subsequent collateral attacks?

(4) Have the Petitioners proven discrimination?

(5) Are these Petitions premature since the Circuit Court remanded the cause to the District Court to permit the Petitioners to prove their alleged discrimination (R. 368-9)?

COUNTER STATEMENT OF THE CASE

1. Preface

Petitioner asks this Court to overrule itself on a federal question and the Supreme Court of Washington on a state issue.

2. Facts

A. General

The issues and facts are complex but all have previously been decided in unappealed final judicial decisions. Complete presentation is difficult because of the lack of a true trial in the District Court.

The three Petitioner corporations, all located at 1021 Westlake North, Seattle, Washington, are owned, operated and represented by the same persons (R. 88-89; 94). Each has leased lands from the United States at Larson Air Force Base near the town of Moses Lake, Washington. The leases are for 75 years and the rental is $100 per year (R. 89; 103-127; and see *Moses Lake Homes v. Grant County*, 51 Wn.(2d) 285 at 286, 317 P.(2d) 1069 (1957).

B. Moses Lake Homes, Inc.

This was the first corporation. It was organized in 1950 to construct and operate 400 rental units on the land it leased from the United States for $100 per year (R. 106). (The lease set forth at R. 103-127 is between the United States and Larson Heights, Inc. With the exception of the land, dates, number of housing units and project cost, etc., it is practically identical to the other leases.) The arrangements were almost identical

to those in *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253, 100 L. Ed. 1151 (1955).

The Moses Lake Lease originally provided in part:

> "11. * * * Upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises shall *become* the property of the government without compensation, * * *" (Emphasis supplied).

In 1952 Grant County assessed the rental units to Petitioner as owner.

Immediately thereafter the lease was modified to provide that title to the improvements was retroactively in the United States. The new paragraph 11 (paragraphs 11 in the Larsonaire and Larson Heights leases (R. 113-114) and paragraph 11 in the lease in *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 100 L.Ed. 1151 (1955)) all provided:

> "1. * * * Upon the expiration of this lease, or earlier termination, all improvements made upon the leased premises *shall remain* the property of the government without compensation, * * *" (Emphasis supplied).

Other paragraphs of the leases provide that this was the "lessee's project" (R. 112 No. 9); that the lessee and the mortgage company would divide the fire insurance between them—the United States, as "title holder" was not even a named insured (R. 119-120, No. 20); and the lessee had possession with the United States having a right to enter (R. 115, No. 14). Paragraph 8 (R. 111-112) specifically requires:

> "8. That the Lessee shall pay to the proper au-

thority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the leased premises. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress of the United States upon the property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this lease shall be renegotiated so as to accomplish an equitable reduction to the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments or similar charges which were imposed upon such Lessee with respect to his leasehold interest in the leased premises prior to the granting of such [116] consent by the Congress of the United States; provided, however, that the amount of such reduction in rental shall in no event be more than 50 percent of the rental provided above; provided, further, that in the event that the parties hereto are unable to agree, within ninety (90) days from the date of the imposition of such taxes, assessments, or similar charges, upon an equitable reduction in rental, such failure to agree shall be considered to be a question of fact within the meaning of the clause of this lease relating to disputes."

Thus, in truth, the government had

"title, but only a paper title" *Offutt Housing Co. v. Sarpy*, 351 U.S. 253 at 261, 100 L.Ed. 1151 at 1160 (1955)

For example, the lessees mortgaged the improve-

ments by "chattel mortgages" (R. 81 *et seq.*) whereas the land (owned by the United States) was not mortgaged.

Washington law requires that all property uniformly be assessed at 50% of its true and fair value in money, Wash. Constit. VII § 2 (17th Amend. 1944).

The value of the property was assessed as follows:

Name	*Assessed Value*	*Mortgage*	*Fire Insurance*
Moses Lake	$500,000 (R. 128)	$3,236,000 (R. 89)	$2,500,000 (R. 90)
Larsen Heights	$100,000 (R. 136)	$1,600,000 (R. 89)	(not in record)
Larsonnaire	$100,000 (R. 138)	$1,782,000 (R. 143)	(not in record)

Obviously, the mortgage encumbrances must have been considered, contrary to the opinion of the circuit court (R. 354, note 18).

The determination of the "value" of the property owned by the various petitioners is presently before the Washington Federal District Court in the condemnation action, E.D., No. Div. No. 1667. Here Petitioners contend that the county assessed the value of their property too high. Below, they urge, the value set by the United States is too low. The impropriety of such inconsistent positions was clear to the Circuit Court which remanded the case for a determination of valuation. (Valuation for taxation and for condemnation purposes are identical, see cases *infra*.)

C. Chronology of Litigation

Some mention must be made of the long and troubled course these issues have taken through the courts.

(1) First Case (1952)—*Moses Lake Homes v. Grant County et al*, Grant County No. 8095, Wash. Supreme Court No. 32442 (R. 90 No. 15; 94):

On May 23, 1952, Respondent assessed these identical taxes for the year 1953 against Petitioner Moses Lake Homes, Inc. Petitioner then modified its lease and brought an action to enjoin both: (1) the 1953 taxes (assessed in 1952) and (2) the taxes *for all subsequent years.*

Following trial on the merits, both aspects of the injunction were denied and petitioner appealed to the Supreme Court of Washington. Before formal argument but after submission of its brief (which urged the very identical issues urged here) in September 1953, Petitioner withdrew its appeal and the State Supreme Court issued its Judgment Against Petitioner on Remittitur. *Petitioner (Moses Lake Homes, Inc.) then paid these very taxes.*

(2) Second Case (1954)

(a) First Appeal (*Moses Lake Homes, Inc., v. Grant County, et al*, 49 Wn.(2d) 182, 209 P.(2d) 840 (1956))

When the assessor, in 1954, assessed the property, Petitioner sought another injunction, asking that Grant County:

> "be permanently restrained and enjoined from levying any tax against the plaintiff upon the said

improvements erected by the plaintiff upon the said leased lands for the year 1955, and further be permanently restrained and enjoined from making any assessment or levy against the plaintiff in the future upon said improvements * * *" *Moses Lake Homes, Inc., v. Grant County, supra,* 49 Wn.(2d) at p. 185.

The issue in that case, as stated by the Court was:

"The question presented by the appeal of Grant County is whether it may levy and collect an *ad valorem* tax on the buildings located on the leased premises (and equipment placed therein), based on the assessed value thereof as determined by the county assessor on the theory that respondent is *the owner* thereof.

"Respondent contends that such a tax may be levied only on *its leasehold interest* in buildings and not as though it were the owner of them." (49 Wn.(2d) at p. 183).

Grant County and the State of Washington had appealed because the trial court had refused to allow the state to intervene as a party. The cause was sent back for retrial.

(b) Second Appeal—*Moses Lake Homes, Inc., v. Grant County*, 51 Wn (2d) 285, 317 P.(2d) 1069 (1957)

The cause was then re-tried and appealed. There was no change of issues. The State Supreme Court in this case stated:

"The term of the lease is longer than the length of the useful life of the buildings * * *." 51 Wn. (2d) at p. 286.

As an analysis of the decision will disclose, it made no difference whether Petitioner was a "beneficial owner" of the improvements or whether the leasehold was valued at the worth of the buildings because under Washington *and* general law

> "The value of the leasehold, for which a nominal rental was paid, would therefore be the worth of the buildings, because the lessee would have the entire enjoyment of them." 51 Wn.(2d) at p. 286.

There is no Washington case contrary to the above.

The petitioner did not seek certiorari to this Court. These very taxes were involved.

There is also a third case, *Moses Lake Homes, Inc. v. State*, 48 Wn.(2d) 499, 294 P.(2d) 1113 (1956), which held appellant liable for sales tax on its purchases of materials to construct the project.

D. Condemnation

The opinion in the above cause became final on December 14, 1957, 30 days following the issue of the opinion. The taxes being unpaid, the County Treasurer, on January 21, 1958, issued Notices of Sale (R. 134-139) setting the sales for March 4, 1958 (R. 135, 137, 139).

The Air Force on February 14, 1958, requested the United States Attorney to proceed with condemnation (R. 29) and the Declaration of Taking (R. 18) was executed the same day (R. 25). Service was made of these items on the Grant County prosecutor on March 3, 1958 (R. 39) and the sale was voluntarily continued to March 18, 1958 (R. 53, No. 10). The Respondent

County was enjoined from collecting its taxes by the Federal District Court on March 12, 1958 (R. 61).

E. Other Petitioners

Two other corporations, Larsonaire Homes, Inc., and Larson Heights, Inc., owned by the same parties, had also built housing units on land leased from the United States.

Because of the uncertainty surrounding the Moses Lake Homes, Inc. litigation, and knowing he would be immediately enjoined, the Grant County Assessor failed to immediately assess the properties of these other corporations.

Following this Court's decision in *Offutt Housing Co. v. Sarpy*, 351 U.S. 253, 100 L.Ed. 1151 (1956), and on January 3, 1957, the Assessor assessed the Larsonaire and Larson Heights properties for previous tax years (R. 344) as "omitted property" as follows:

Larsonaire Homes, Inc.

Assessment Year and Lien Date	*Tax Payable*	*Tax*
May 31, 1955	April, 1957	$21,750.00
May 31, 1956	April, 1957	18,798.00
		$40,548.00

Larson Heights, Inc.

May 31, 1956	April, 1957	$18,706.00

Following the assessment, but before the taxes could be levied in October 1957, these corporations obtained like injunctions.

In *Larson Heights, Inc., v. Grant County*, and *Larsonaire Homes, Inc., v. Grant County*, Grant County Superior Court Nos. 10682 and 10683 (R. 91) Respondent was temporarily enjoined from levying or assessing taxes for 1956, 1957 and all subsequent years, until the Remittitur was handed down in *Moses Lake Homes, Inc., v. Grant County* (2d case). These cases remain untried.

We note with more than some curiosity that the deposit pursuant to the Declaration of Taking was $253,000 (R. 30). The total taxes assessed *prior to* the declaration total $246,481 (R. 344). The amount deposited by the United States pursuant to the Declaration of Taking was $253,000 (R. 30). This is no happenstance—it is another reason, we suggest, the Circuit Court remanded the cause for a hearing on value.

F. Conclusions of the Circuit Court

1. The taxes levied against *Moses Lake Homes, Inc.*, for the years 1955 and therafter could not be contested because of the doctrine of *res judicata* (R. 348).

2. The Petitioner, Moses Lake Homes, Inc. could not contend that the 1955 and 1956 taxes were not levied or assessed prior to June 15, 1956, under Sec. 511 of the Housing Act of 1956, 69 Stat. 652, because it could not profit by its own injunction (R. 349).

3. The lien of the 1957 tax had attached by relation back prior to June 15, 1956 (R. 352-3).

4. That the County Assessor was not actually restrained from assessing the properties of Petitioner's

Larsonaire, Inc. and Larson Heights, Inc. (R. 364-365). Thus no inchoate lien arose until after June 15, 1956.

5. Washington taxes all leaseholds the same whether the improvements outlast the term or not — except *Wherry Act* leaseholds (R. 353).

6. The Petitioners had failed to sustain the burden of proving actual discrimination, if any (R. 355).

7. The cause was remanded to permit the Petitioners to prove how much, if at all, their taxes exceeded taxes on similar property in Grant County.

8. The cause was also remanded to permit the Petitioners to obtain proper Determinations of Federal Expenditures for use as offsets to local taxes.

ARGUMENT

Summary

I. The condemnation and placement of the funds on deposit with the court effected no change in the tax consequences. Condemnation merely substituted the award in which the United States has no interest, for the property which it condemned.

II. The Petitioners were the beneficial owners of taxable interests in real and personal property. They were taxed on the value of the property attributable to them. This is general law, Washington law and Federal law.

III. *If* Petitioners were taxed discriminatively, it is bound by the doctrine of *res judicata*. Two separate Washington Supreme Court decisions have become final on the very issues urged collaterally before this court.

Condemnation Does Not Alter the Tax Picture

A. General

The tax issues here are in no way affected by the condemnation. As the trial court said:

> "They have deposited the money and it should be a matter of indifference to the government as to how it is distributed." (R. 205).

The great power of Eminent Domain is not to determine rival claims to property or to its substitute, the award. Its function is to determine public use and necessity and the value of the property to be taken, *Morgan v. Willenan*, 1 S.W.(2d) 193, 58 A.L.R. 1518 (1927). It would be a gross misuse of power if the purpose of this condemnation was to prevent the collection of taxes or to assist these Petitioners to evade such taxes.

Compensation paid for land taken by eminent domain represents the land and is subject to all rights of those having interests in the land, 10 R.C.L. 137; *Cullen & Vaughn Co. v. Bender Co.*, 170 N.E. 633 (Ohio 1930), Anno. 68 A.L.R. 1338 *et seq.*; *Chicago v. Tebbetts*, 104 U.S. 120, 26 L.Ed. 655 (1881); *U. S. v. Dunnington*, 146 U.S. 338, 36 L.Ed. 996 at 1001 (1892).

Incidental to the primary issues, the court has power to determine who are owners of the award if that has not already been previously determined. The condemnation action is a proceeding in rem and the owners and lienholders of the res share in the award, (*U. S. v. 2979.72 Acres of Land, etc.*, 235 F.(2d) 327 (4th Cir. 1956)).

Thus, the rights of the parties which have been de-

termined by the state courts, as set forth in the Circuit Court opinion below, are binding upon them—the fact that a third party condemns or substitutes a money deposit for the property cannot change rights previously and conclusively resolved.

Discrimination Is Non-existent

1. What are taxes — Valuation

This is perhaps the most misunderstood in the field of taxation. Without consent, a state may not tax property "owned" by the United States. Since "title" usually is consonant with ownership, it is easy to conclude that the state may not tax property when "title" is in the United States.

A more correct statement would be that the State may not include tax exempt interests in its valuation of property for tax purposes. Under general and Washington law, bare legal title such as under a conditional sales contract, a possibility of reverter or other reversionary interest, or the lessor's interest in a lease of 99 or 75 years, is not such an interest as to prevent taxation of the full value of the improvements to the lessee. This is particularly true where, as here, the improvements will not last the length of the term, and when all rents from sub-lessees and profits accrue to the lessee.

Since this type of lessee under Washington law is taxed to the full value of the improvements, Appellant can raise no federal question unless he shows that when the lessor is a tax-exempt federal entity, that the value of the lessor's interest has been included or that discrimination exists. The lessee would then be entitled to

a tax reduction to the value of the exempt non-discriminatory interest but no more. He must establish the value of that interest and the amount of discrimination which has not been done.

Property tax discrimination occurs when one citizen pays more taxes than another having similar property. Actual, not theoretical, discrimination is required. Methods of valuation are constitutionally unimportant to the validity of the tax unless actual discrimination results. Thus, an assessor could "guess" at the valuation of property and if, peradventure, the *results* were uniform and equal there is and can be no discrimination.

The Washington State Constitution, Art. VII, § 1 (14th Amend.) specifically enjoins against discrimination:

> "All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be for public purposes only."

The requirement of uniformity is so highly regarded it even prohibits a graduated net income tax, *Culliton v. Chase,* 174 Wash. 363, 25 P.(2d) 81 (1933); *Jensen v. Henneford,* 185 Wash. 209, 53 P.(2d) 607 (1936); *Petroleum Nav. Co. v. Henneford,* 185 Wash. 495, 55 P. (2d) 1056 (1936); *Power, Inc. v. Huntley,* 39 Wn.(2d) 191, 235 P.(2d) 173 (1951) and see *Apartment Operators Association v. Schumacher,* 156 Wash. Dec. 43 (Adv. No. 1, 1960). Yet Petitioners assert the same court blythely authorized a similar discrimination without even a discussion of the issue.

2. "Title"

"Title" is not the keystone. It is but one incident in total ownership. Often, as in trusts, title is completely separate from "beneficial" ownership. In tax matters, the clearest example is found where the United States sells property and retains title for security purposes. There the United States has: (1) title, (2) reversionary interest, and (3) an "equity" in the taxed property to the extent of the unpaid sales price. Neither of these interests alone, nor their combination, prevents local taxation of the sold item at its full value to the private purchaser, *S.R.A. v. Minnesota*, 327 U.S. 558, 90 L.Ed. 851 (1946). This is true even though the seller has yet received no payments.

In a conditional sales contract, the seller-owner either has created or originally owned the complete value of the property sold. In a long-term lease where the lessee improves the property for its own use, as here, the lessee rather than the title holder creates the value by constructing at its own expense, and for its own profit, improvements which will not last the length of his possession and use. The lessor's reversionary interest in the improvements is but slightly more than zero. The "value" thereof even less.

The situation is strikingly similar to the doctrine first announced in the income tax case of *Helvering v. Clifford*, 309 U.S. 331, 84 L.Ed. 788 (1940). There to avoid federal income taxes a taxpayer transferred certain interests in trust to others retaining not only the usual trustee's interest but the rights of control and profit. This Court properly held the rights re-

tained constituted beneficial ownership of the *res* which required taxable ownership of income from the entrusted items. The "bundle of rights" the trustee retained was too substantial for him to complain of being taxed as sole owner. See also *Du Pont v. Commissioner of Internal Revenue*, 289 U.S. 685, 689, 77 L. Ed. 1447 (1932).

That the total value of improvements which will not last the term belong to the lessee is not "new" law. For example, for a lessee to have an interest in property that he may depreciate for federal income tax purposes, he must have an "ownership" interest therein, 4 Mertens Fed. Income Taxation, § 23.06. Thus, where a lessee railroad company constructs improvements which will not last the term of its lease, the expenditures are not "additional rentals" to the landlord but capital expenditures made by the lessee for its own total use which it may depreciate over the useful life of the buildings, *Duffy v. Central R. Co.*, 268 U.S. 55, 69 L.Ed. 846 (1925); see also *Gladding Dry Goods Co.*, 2 B.T.A. 336; *Coger v. Comm*, 44 F.(2d) 554 (6th Cir. 1930); and Reg. 1.167 (a)-4.

The lessee is able to depreciate the entire cost of the improvement because he is the beneficial owner of the total value of the improvement. Further, of course, the lessee's improvements which do not last the length of the term are not income to the landlord, *Blatt Company v. United States*, 305 U.S. 267, 83 L. Ed. 167 (1938) and see annotations at 98 A.L.R. 1207.

Perhaps the most important decisions in this area are the conditional sales cases. In *S.R.A. v. Minnesota, supra*, the United States sold property on a conditional

sale to a private citizen specifically reserving legal title until paid in full. Minnesota levied its property tax. The question was the

> "power of Minnesota to tax realty within the boundaries of that state, when the legal title remains in the United States." 90 L. Ed., p. 854.

The answer was:

> "The whole equitable ownership is in the petitioner and the value of that ownership may be ascertained on the basis of the full value of the land." *New Brunswick v. United States, supra,* 276 U.S. 547, 72 L. Ed. 693 (1928), 90 L. Ed. at p. 860.

Where mining claims are involved, federal title is also no bar to state property taxation, *Elder v. Wood,* 208 U. S. 226, 52 L. Ed. 464 (1908).

On an issue involving consumer sales taxes upon materials for a military housing project under what appears an identical lease, the Florida Supreme Court held that beneficial ownership, not "paper title" controls, *Gay v. Jemison,* 52 So.(2d) 117 at 137 (Fla. 1951), see also *Moses Lake Homes, Inc. v. State,* 48 Wn.(2d) 499, 294 P.(2d) 1113 (1956).

See also the numerous citations in *Haumesser v. Chehalis County,* 76 Wash. 570 at 574, 136 Pac. 1141 (1913), where although the facts were different the court stated that "Washington law" was as follows:

> "it is the well-established doctrine that he who has the right to property and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of taxes. *Railroad Co. v. Price, supra,* 133 U.S. 496, 10 S.Ct. 341, L.Ed. 687."

For other decisions, see *Russell v. New Haven*, 51 Conn. 259 (1883); *Burbank v. Board of Assessors*, 27 So. 947 (La. 1900); *Norfolk v. J. W. Perry Co.*, 61 S.E. 867 (1908); *Hines Lumber Co. v. Lane County*, 258 P.(2d) 720 (Ore. 1952); and *Ex Parte Gaines*, 19 S.W. 602 (Ark. 1892); *Bentley v. Bartow*, 41 Ohio St. 410 (1884). In *P.W.&B.R.Co. v. Appeal Tax Court*, 50 Md. 397 (1879) a railroad company leased land from a tax exempt city for a 99-year term. The court held (1) the lessee should be taxed on the land to the extent of its leasehold interest, and (2) directly upon the improvements erected by the lessee at their full value. The court stated:

> "As to the improvements placed upon the two parcels leased from the city by the appellant, we fully concur with the court below, that they were placed upon the demised premises by the appellant for its own use and benefit, they were properly assessed to the appellant at their full assessable value."

In *Broadway and Fourth Ave. Realty Co. v. Louisville*, 197 S.W.(2d) 238 (Ky.), a realty company leased land from a tax exempt educational institution for 99 years. The court held the lessee should be taxed on the improvements erected by it as if it had title and full ownership.

Outer Harbor, Dock & Wharf Co. v. Los Angeles County, 193 Pac. 142 (Cal. App. 1920). The lessee constructed a wharf and warehouse on leased state lands and was properly taxed on the improvements as owner. See also *San Francisco v. McGinn*, 7 Pac. 187 (Cal.

1885), where the lease was but for 50 years. Compare *San Diego County v. Davis*, 33 P.(2d) 827 (Cal. 1934).

In *Percival v. Thurston County*, 14 Wash. 586, 45 Pac. 159 (1896) Percival had applied to the State for a lease of state tidelands. These lands, by Washington Constitution, could not be sold—only leased. He constructed a wharf, a large dock and a warehouse upon which the county imposed property taxes. He sought to enjoin the threatened sale of the improvements for failure to pay taxes. The injunction was denied, the court holding that these *improvements* were taxable.

We have no quarrel with the general and Washington rule that:

> "In determining the worth of a leasehold the courts have universally held that it is the value of the term less the rent reserved." *In re Metropolitan Building Co.*, 144 Wash. 469 at p. 476, 258 Pac. 473 (1927)

In all such Washington cases, however, the improvements will last beyond the term of the lease. The issues here were not there involved.

Here, as shown by the Detail and Assessment sheets (R. 127, 129, 131) the taxes were assessed upon the beneficial ownership in the improvements pursuant to the *Offutt* decision. However, *if* the taxes were upon the leasehold and included as the measure of the value of the beneficial ownership, the full value of the improvements, the result would be the same and valid. Technical distinctions should not thwart justice.

Further, there is not a scintilla of evidence in this record or in any court proceedings involved that the Re-

spondent did not correctly value the interest of the Petitioners or that he did not utilize the methods they contend are correct. There is absolutely no evidence in the entire record to justify a statement that these Petitioners were taxed at a "higher rate" than "Wherry Act leaseholds" as stated by the United States Brief at pp. 11 and 16.

3. Appellate decisions on these housing projects

Every appellate court decision rendered as of this writing has held the state property tax applied to these identical housing projects.

Where title was clearly in the lessee, this has been used as an additional ground to support taxes. See *Fort Dix Apartment Corp. v. Borough* and *Sheridanville, Inc., v. Borough*, 125 F. Supp. 743 (1954), taxability affirmed on appeal, 225 F.(2d) 473 (1955) cert. denied, 351 U.S. 962, 100 L. Ed. 1483; *Meade Heights, Inc. v. Tax Commission*, 95 A.(2d) 280 (Md. 1953); *Gay v. Jemison*, 52 So.(2d) 117 (Fla. 1951); *Dayton Devel. Ft. Hamilton Corp. v. Boyland*, 133 N.Y.S. 821 (1954); *Conley Housing Corp. v. Coleman*, Sup. Ct. of Georgia, No. 19001 (Sept. 12, 1955), and *Offutt Housing Co. v. County of Sarpy, supra.*

Compare *United States v. Detroit*, 355 U.S. 466, 2 L. Ed.(2d) 424 (1957); and *United States v. Township of Muskegon*, 355 U.S. 484, L.Ed. (2d) 436 (1957).

4. Petitioner's Remedies

The brief of the United States (p. 25) urges that the Circuit Court below erred in remanding the cause for

proof of correct valuation. It states that Washington law does not permit this. This is *exactly* the procedure followed in *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473 (1927). There, the trial court held a leasehold had been incorrectly valued; heard evidence as to the correct valuation and reduced the assessed valuation—all of which was approved on appeal.

The various procedures which Petitioners are required to follow in their attack upon these taxes are set forth, *infra*. Washington follows general law in this regard. Injunctions are prohibited under R.C.W. 84.68.010 providing:

> "*Injunctions prohibited — Exceptions.* Injunctions and restraining orders shall not be issued or granted to restrain the collection of any tax or part thereof, or the sale of any property for the nonpayment of any tax or part thereof, except in the following cases:
>
> (1) Where the law under which the tax is imposed is void; and
>
> (2) Where the property upon which the tax is imposed is exempt from taxation."

See *Casco Co. v. Thurston County*, 163 Wash. 666, 2 P. (2d) 677 (1931). The remedy is payment under protest and a suit to recover. This remedy is exclusive and constitutionally valid, *Snyder v. Marks, C.I.R.*, 109 U.S. 189, 27 L.Ed. 901 (1883) and *Dodge v. Osborn, C.I.R.*, 240 U.S. 118, 60 L.Ed. 557 (1916).

Since Petitioners attack "valuation" they are met head on by R.C.W. 84.68.070 providing:

> "*Remedy exclusive—Exception.* Except as per-

mitted by this chapter, no action shall ever be brought or defense interposed attacking the validity of any tax, or portion thereof; *provided*, That this section shall not be construed as depriving the defendants in any tax foreclosure proceeding of any valid defense allowed by law to the tax sought to be foreclosed therein except defenses based upon alleged excessive valuations, levies, or taxes."

See *Western Machinery Exchange v. Grays Harbor County, (en banc)* 190 Wash. 447 at p. 452, 68 P.(2d) 613 (1937). This holding was modified by *Island County v. Calvin Phillips, Inc.*, 195 Wash. 265, 80 P.(2d) 840 (1938). This led to the enactment of the above statute, in its present status, in 1939.

There is now, in Washington, no question but that the defense of over-valuation is not available in a tax foreclosure proceeding. It is a tax foreclosure proceeding that we have here and which the District Court enjoined in a collateral condemnation action. *Anderson v. King County*, 18 Wn. (2d) 176, 138 P. (2d) 872 (1943).

The Petitioners in the District Court did not even allege over-valuation, improper valuation, excessive valuation, or discrimination (R. 65, 67, 71). They alleged only that their leaseholds were never assessed.

A tax on property is one of the oldest methods of raising revenue. Methods and procedures vary but little among the states. In Washington, as in most states:

"Personal property includes * * * and all improvements upon lands the fee of which is vested in the United States, or in the state * * *" R.C.W. 84.04.080.

The resident owner of property is required to:

> "list all his personal property" R.C.W. 84.40.180 and deliver that list under oath to the Assessor.
>
> "84.40.200 *Default listing of personalty—Statement of valuation to owner.* In all cases of failure to obtain a statement of personal property, from any cause, the assessor shall ascertain the amount and value of such property and assess the same at such amount as he believes to be the true value thereof. The assessor, in all cases of the assessment of personal property, shall deliver or mail to the person assessed, or to the person listing the property, a copy of the statement showing the valuation of the property so listed, which copy shall be signed by the assessor."

The Petitioners refused to comply with the law. They have submitted nothing on valuation to anyone—not even to the court. The penalty for refusing to list property with the assessor is a penalty of not more than $2,000. R.C.W. 84.40.130.

The assessor is required to commence assessments by December 1st

> "and complete his duties of listing and placing valuations on all property by May 31st of each year * * *" R.C.W. 84.40.040.

He makes out a "Detail and Assessment List," R.C.W. 84.40.050 (R. 127, 129 and 131).

> "The taxes assessed upon each item of personal property shall be a lien upon such personal property from and after the date upon which it is listed and valued by the County Assessor * * *" R.C.W. 84.60.030.

The Detail and Assessment lists are then compiled by

the Assessor into permanent book form and on the first Monday in July these books are transmitted to the County Board of Equalization, R.C.W. 84.40.320.

The county Board meets, beginning the first Monday in July, to equalize all assessments on a county-wide basis, R.C.W. 84.48.010. "Equalization" is the process by which assessments as a whole are reviewed to determine whether they are relatively equal in all parts of the county and to adjust assessments to the same relative standard so no part of the county pays a disproportionate part of the tax, 3 Cooley on Taxation, p. 2389 (4th Ed.)

The assessor then corrects the assessment rolls in accordance with the changes made by the Board and transmits the corrected rolls to the State Board by the following August 1st, R.C.W. 84.48.040. The assessments are then equalized on a statewide basis for state tax purposes, R.C.W. 84.48.080.

The taxpayer can protest the valuation of his property before the County Board, R.C.W. 84.48.020. Both the taxpayer and the assessor have the right to appeal decisions of the County Board to the State Board, R.C.W. 84.08.130 and .140 and then to the courts, *Schneidmiller & Faires v. Farr*; 156 Wash. Dec. 906 (Adv. No. 27, Oct. 6, 1960).

The assessor then makes a final record of all errors, double assessments, etc., and files this record with the County Board of Equalization on the third Monday in November. The Board then makes such corrections as are necessary, R.C.W. 84.52.090. On December 15th, the

corrected tax rolls are certified by the Assessor to the County Auditor, R.C.W. 84.52.080.

The auditor, after making his record for audit purposes, on the first Monday in January next, certifies the tax rolls to the County Treasurer for collection, R.C.W. 84.56.010. The Treasurer then notifies each taxpayer of his tax, R.C.W. 84.56.050. The collection procedure begins the 15th of February. If taxes are not paid voluntarily, the Treasurer must commence distraint and sales procedures.

Following completion of the valuation-assessment procedure, the taxes are levied. The term "levy" is loosely used but strictly speaking, it means the laying of a tax in specific amounts against specific property, 3 Cooley on Taxation, p. 2043 *et seq.*; and Black's Law Dict. 3rd Ed.).

By the first of October the budgets of the county offices plus those of the various taxing districts within the county have been filed with the County Commissioners. These amounts cannot exceed the percentage (millage) rate allowed each taxing entity by law. The total millage cannot exceed 40 mills except for specially voted "excess levies") by constitutional prohibition, Wash. Constit., Art. VII, § 2 (17th Amend.) and R.C.W. 84.52.050.

The assessor then, based upon the allowable budget expenditures, determines the percentage rate of all taxes against the property within the taxing district and extends these tax rates against the property on the tax rolls, R.C.W. 84.52.010. The tax rolls are then passed

upon by the County Commissioners at their October session, R.C.W. 84.52.030, and .040. These are then certified back to the assessor, R.C.W. 84.52.070.

The Petitioners here failed completely to comply with these procedures. They brought their litigation which they lost. They now collaterally attack those judicial decisions.

5. Omitted Property

You will recall that each of the three corporations refused to list their property. Instead they sought misconceived court injunctions which prevented the assessor from listing the property. The taxing procedures were thus wrongfully delayed as the result of the actions of these corporations.

The assessor was enjoined by the state court in the Moses Lake matter and as a result he did not list and assess Larsonaire Homes and Larson Heights. He did so later and was enjoined.

When the case was ultimately won by Respondent and the taxes held valid and the injunction discharged, the assessor assessed the property for the back years by way of the omitted property statute, R.C.W. 84.40.080.

The omission of taxable property from the tax rolls wrongfully increases the tax burdens of others. This should be permitted neither by the good faith error of a public official, nor the effort of a taxpayer to avoid his fair share of the public burden. See *Florida Nat. Bank v. Simpson*, 59 So.(2d) 751, 33 A.L.R.(2d) 581 at 590 (Fla. 1952).

"Taxes are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation * * *."

Further:

"The owner of taxable property omitted from the tax rolls becomes liable for the tax thereon at the time the property ought to have been placed upon the rolls and this liability continues until the tax is discharged by payment." 51 Am. Jur., Taxation, p. 676

"Where property is assessed for back years, the general rule is that the rate of the tax as well as the valuation is to be determined as of the year when the property escaped taxation." 3 Cooley on Taxation, p. 2342 (4th Ed.)

In Washington, the valuation of the property is entered as of the omitted year in the detail and assessment list for the current year, R.C.W. 84.40.080. Placing the omitted property on the current year's rolls satisfies the due process requirement of notice and opportunity for hearing, *Winona & St. Peter Land Co. v. Minn.*, 159 U.S. 526 at 537, 40 L. Ed. 247 at 251 (1895).

As aptly stated in the *Winona* case:

"If a party interposes as a defense an omission of any of the things provided by law in relation to the assessment or levy of a tax, or of anything required by any office to be done prior to filing the list with the clerk, the burden is on him to show that such omision has resulted in prejudice to him and that the taxes have been partially, unfairly or unequally assessed. This relates, not to want of authority to levy the tax, but to some omission to do

> or irregularity in doing the things required to be done in assessing or levying a tax otherwise valid." 159 U.S. at 537.

Further:

> "And certainly, in justice or in reason, a party cannot complain that, when he objects to a tax on the ground of some omission or irregularity in matters of form, he is required to show that he was prejudiced." 159 U.S. at 537.

None of these tax-avoiding corporations has made, nor can they make, the slightest proof of prejudice to them.

> "An owner cannot escape by contesting the right of assessors to impose the tax and by keeping the matter in litigation beyond the time fixed by law for making the assessment." 51 Am. Jur., p. 676 *supra*; *State ex rel. Taggert v. Holcomb*, 106 Pac. 1030 (Kan.).

It would be outright injustice to the people of Grant County to permit these taxpayers to utilize their wrongful injunctions and wrongful failure to list their property to escape their congressionally decreed duty to pay taxes. Yet this is the main tenet of their argument.

The validity of the taxes has been determined. The offsets should be determined as if no injunction had been in force, the taxpayers had filed their lists as required by law and the assessment and levy had followed their normal course.

6. Time of lien

As we see it, since (1) taxes are valid and (2) certain offsets are proper, the remaining question is whether the offset applies to 1957 taxes, assessed February, 1956 —payable 1957.

Taxes in Washington become liens on personal property as of the time of assessment, R.C.W. 84.60.030; *Mills v. Thurston County*, 16 Wash. 378, 47 Pac. 759 (1897); *Phelan v. Smith*, 22 Wash. 397, 61 Pac. 31 (1900); *Ernst v. Guarantee Millwork, Inc.*, 200 Wash. 195, 93 P.(2d) 404 (1939); *P.U.D. No. 1 of Lewis County v. Pierce County*, 24 Wn.(2d) 563, 166 P.(2d) 933 (1946); and *State ex rel. Peoples Bank v. King County*, 36 Wn.(2d) 10, 216 P.(2d) 225 (1950).

This is the general rule, *United States v. Alabama*, 313 U.S. 274, 85 L. Ed 1327 (1941); *United States v. Sampsell*, 153 F.(2d) 731 (9th Cir. 1946); *People ex rel. Haveman v. Commissioners*, 104 U.S. 466, 26 L. Ed. 632 at 633 (1881); *County v. Drake* 41 N.W. 942 (Minn); *Wildberger v. Shaw*, 36 So. 599 (Miss); *Wood v. McCook Waterworks*, 97 Neb. at 217 and 220, 149 N.W. 417; and *Allen v. Bemis*, 108 A.(2d) 549 (N.H. 1954).

It is of no consequence that the property assessed becomes exempt prior to levy, the lien remains valid, see *Airbase Housing, Inc., v. Spokane County*, 156 Wash. Dec. 604 (Adv. No. 20, Aug. 25, 1960) overruling *Puget Sound Power & Light Co. v. Cowlitz County*, 38 Wn. (2d) 907, 234 P.(2d) 506 (1951) relied on by the Petitioners. This is the general rule, see 63 A.L.R. 1332.

In this instance, the 1957 taxes assessed upon Wherry projects would have become liens or "encumbrances" in the spring of 1956 prior to the June 15, 1956, date specified in Sec. 511 (42 U.S.C.A. § 1594 note). No question of exemption is involved. Section 511 merely provides for a deduction of monies from payment of the valid tax.

We have examined the taxing process in some detail to disclose its nature and the procedures which could have been and should have been followed by these Petitioners to assert their contentions as to improper valuations.

The effect of their failure to do so and their complete disregard of Washington laws should not be visited upon the other citizens of Grant County who for years now have been paying Petitioners' share of the expenses of government.

The government urges that Petitioners pay a higher tax than lessees of other property (Gov. Br. 22 *et seq.*) Petitioners imply (Br. 12) this and the court below (R. 355 note) assumes this. *There is absolutely no support for this in any record in any of the cases heretofore tried.*

Assume that Petitioners leased its 400 housing units, less a 5% vacancy factor, for $100 each per month. This would equal a gross rental return of $38,000 per month; $456,000 per year; or $10,900,000 for the 25 years necessary to pay off the mortgage, which at 4% interest, would require a total repayment of $4,854,000.

These will be the issues when Petitioners and the United States contest the value of the property for condemnation purposes. These should have been the issues where Petitioners assert the valuation of their property is discriminatively high.

Issues Presented in Condemnation Action

(Three Judge Court)

Washington Constitutional law, case law and statute law all specifically prohibit tax discrimination. So does our Federal Constitution. Like any other justiciable issue, a discriminatory tax may be attacked by a proper procedure before a proper forum.

Discriminatory valuation is merely another term for excessive valuation—that is, a valuation of Petitioners' property which exceeds that of other and similar property within the taxing enclave. This, in Washington as in most states, can only be attacked by payment of the tax and suit for refund. Of all the state remedies available to these Petitioners to assert their claims, none has been followed. Even yet there is neither allegation nor intimation that the state remedies are inadequate.

Respondent County was brought into the condemnation action below in the District Court by an injunction prohibiting the county treasurer from collecting state and county taxes. This type of injunction requires a three-judge court pursuant to 28 U.S.C.A. §2281 providing:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be grantgd by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the applica-

tion therefor is heard and determined by a district court of three judges under section 2284 of this title."

This prohibition applies to actions seeking to enjoin the collection of state taxes, see *Query v. United States*, 316 U.S. 486, 86 L. Ed. 1616 at p. 1620 (1942):

"Here a substantial charge has been made that a state statute as applied to the complainants violates the constitution. Under such circumstances, we have held that relief in the form of an injunction can be afforded only by a three-judge court pursuant to section 266 [citing cases]".

A "state" tax as well as a county tax is here involved, see *Moses Lake Homes v. Grant County*, 49 Wn.(2d) 182, *supra*, at p. 184:

"In our opinion, the complaint in intervention alleged a substantial interest in the pending litigation by reason of the state's two-mill tax."

Therefore, this action is not within the exception of *Ex parte Public National Bank*, 278 U.S. 101, 73 L. Ed. 202 (1928) holding at section 266, the predecessor of 28 U.S.C.A. § 2281, did not apply to restrain the enforcement of a city tax statute by a city official. See also *Stratton v. St. Louis Southwest R. Co.*, 282 U.S. 10, 75 L.Ed. 135 (193) and *Chicago G.R.W. Co. v. Kendall*, 266 U.S. 94, 69 L. Ed. 183 (1924). Three-judge courts sat in the following cases: *Chicago Great Western Co. v. Kendall, supra*, and *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 67 L. Ed. 659 (1922).

It would therefore appear clear that a condemnation action is no forum to press the constitutional validity of a state tax. The Petitioners have and had clear and ade-

quate remedies in the state courts *which they have already used to the fullest*. The only remedy available to them which they did not use was their complete and utter failure to seek review by this court.

Res Judicata

The Circuit Court held (R. 348):

> "A judgment upon the merits in a state court action is *res judicata* in a subsequent federal court action where the parties and subject matter are the same. This is true not only with regard to matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end, *Grubb v. Public Utilities Commission of Ohio*, 281 U.S. 470."

Certiorari to this Court is a remedy the Petitioner, Moses Lake Homes, Inc., did not seek. Whether this Court would, in its discretion, grant a review of the state court action, does not alter the doctrine of *res judicata*. We note however that Petitioner sought and obtained a review of the Circuit Court decision by this Court based upon the opinion in *Moses Lake Homes, Inc., v. Grant County*, 51 Wn.(2d) 285, 317 P.(2d) 1069 (1957).

We do not follow Petitioner's argument that this Court would "probably not" grant Certiorari and therefore *res judicata* is no bar. Even were *res judicata* affected by the failure of this Court to grant a review, the identical types of issues were presented and review granted in this Court's review of State Court action in the *Offutt* case, *supra;* in *Detroit v. Murray Corp.*, 355

U.S. 495, 2 L.Ed.(2d) 411 (1958) and their companion cases; as well in *Phillips v. Dumas School Dist.*, 361 U. S. 376, 4 L.Ed.(2d) 384 (1960).

The obvious reason Petitioner did not seek Certiorari from the State Supreme Court decision was the decision of this Court in the *Offutt* case. Petitioner in one breath urges that the State Court decision proves an unconstitutional discrimination and then, in the next breath, argues that the decision was based upon adequate non-federal grounds which this Court would not have reviewed. If either facet of its logic is correct, it is out of court.

Further, Petitioners, in their Petition for Certiorari, or in their brief, do not challenge the Circuit Court's holding on the *res judicata* issue. They thus apparently accept the ruling of the Circuit Court on that issue.

The United States alleges, without support, that Nebraska tax law, Neb. Rev. Stat. §§ 77-1209 is different from Washington tax law, By Washington statutes, R.C.W. 84.04.080, personal property is defined for tax purposes to include

> "* * * all improvements, the fee of which is still vested in the United States or the State; * * *"

The purpose of this section is to prevent the application of the common law doctrine of accession. The improvement therefore remains taxable. This is the statute involved in *Percival v. Thurston County, supra*, and is the reason for the decision. This is also the Nebraska law.

CONCLUSION

These conclusions appear obvious:

(1) The tax validity issue should be determined as if condemnation were not involved;

(2) The validity of the taxes should be determined as if the taxes had been properly, timely, and regularly levied and assessed without the hindrance of lawsuits, injunctions, and threats thereof;

(3) The Washington court is not so far out of step with general law and its own Constitution as Petitioners allege;

(4) The record is completely devoid of any showing that

(a) Any of the Petitioners followed the proper steps to contest the alleged excessive valuation of their property;

(b) The valuation of their property was not correct; and

(c) The valuation of their property exceeded that of similar property within the county;

(5) *Res judicata* bars any contest of the validity of the 1955, 1956 and 1957 taxes, plus interest assessed against Moses Lake Homes, Inc.

Respectfully submitted,

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